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No. 83-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EL PASO NATURAL GAS COMPANY,
Petitioner,

v.

TENNECO OIL COMPANY, *et al.*,
Respondents.

Petition For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether a natural gas producer can circumvent federal price regulation by transferring its vast proven reserves to an interstate pipeline through a sale of gas in the ground—a sale that in all material respects is the economic equivalent of a conventional gas sales contract between a producer and a pipeline.

LIST OF PARTIES

Public Agencies:

Federal

Federal Energy Regulatory Commission

State

People of the State of California
Public Utilities Commission of the State of California
Idaho Public Utilities Commission
Public Service Commission of Nevada
Public Utility Commissioner of Oregon
Washington Utilities & Transportation Commission
Public Service Commission of Wyoming

City

City of Ellensburg, Washington

Interstate Natural Gas Pipeline Companies:

El Paso Natural Gas Company
Northwest Pipeline Corporation

Distribution Companies:

Cascade Natural Gas Corporation
Colorado Interstate Gas Company
CP National Corp.
Intermountain Gas Company
Mountain Fuel Supply Company
Northwest Natural Gas Company
Pacific Gas and Electric Company
Rocky Mountain Natural Gas Company
San Diego Gas & Electric Company
Southern California Edison Company
Southern California Gas Company
Southern Union Company
Southwest Gas Corporation
Washington Natural Gas Company
Washington Water & Power Company

Producers:

El Paso's System	Party
GLA 47	Tenneco Oil Company Conoco, Inc.
GLA 51	Mapco, Inc. Hopi Oil Company
GLA 52	Tenneco Oil Company Conoco, Inc. Union Oil Company of California New York Life Insurance Company
GLA 60	Tenneco Oil Company Conoco, Inc. Charles Colwill Anne Home Emerson, Trustee Ina Belle Hightower Anna Lou Home Jean E. Keyser Cassandra Keyser Teresa Home Barron Kidd W. H. and Alberta A. Sloan Helen Ulmer van Atta
GLA 61	Sun Oil Company (Delaware)
GLA 62	FHN, Ltd.
GLA 63	Atlantic Richfield Company
GLA 66	W. Watson LaForce, Jr. Henry P. Isham, Jr. Estate Robert T. Isham Josephine C. Jacobson J. Roberts Jones Nancy LaForce Keyes

El Paso's System	Party
	Frederic P. G. Lattner, Trustee U/T Martha M. Lattner, Settlor
	Suzanne LaForce Baber
	James C. Bard
	Douglas N. Bard
	Ralph A. Bard, Jr.
	Roy E. Bard, Jr.
	G. R. Brainard, Jr. Trust
	Continental Illinois National Bank and Trust Company of Chicago, Trustee Trust #23935
	Continental Illinois National Bank and Trust Company of Chicago, Trustee Trust #23949
	Eleanor Isham Dunne
	Charles W. Farnham, Jr.
	Robert B. Farnham
	Walter B. Farnham
	Elizabeth B. Farrington
	Minnie A. Fitting
	R. U. Fitting, Jr. Estate
	Robert D. Fitting
	Nancy H. Gerson
	John R. Grimes
	Jay C. Halls and Ruth N. Halls, Trustees
	Ruth N. Halls
	Cortland T. Hill
	Elsie F. Hill
	Louis W. Hill, Jr.
	Albert L. Hopkins, Jr.
	George S. Isham
	R. S. MacDonald, A. MacDonald and Northern Trust Co., Trustees U/W of N. S. MacDonald, Deceased

El Paso's System	Party
	Mary F. Love
	William J. McDermott, Trustee
	Nora R. Ranney
	Catherine H. Ruml
	Edward L. Ryerson, Jr.
	Sabine Royalty Corporation
	Shaw, Isham & Company
	John I. Shaw, et al., Trustees
	Elizabeth B. Simpson Trust
	James Simpson, Jr. Trust
	William E. Simpson Trust
	Sydney Stein, Jr.
	Northern Trust Co., Trustee U/W of John Stuart
	Robert Douglas Stuart Estate
	William P. Sutter
	Michael Simpson Trust
	Patricia Simpson Trust
	Kay B. Towle
	Katharine I. White
	Kay B. Gundlach
	F. F. Webster Revocable Trust
	Frederick F. Webster
	Mary S. Zick
	David Waller Dangler
	Ralph U. Fitting, III, Executor of Estate of R. U. Fitting, Jr., Deceased
	J. Robert Jones, Executor of Estate of R. U. Fitting, Jr., Deceased
GLA 72, 86, 101, 127	Mapco, Inc. Hopi Oil Company

El Paso's System	Party
GLA 76	Union Oil Company of California
	First National Bank of Ft. Worth, Trustee for Eula May Johnston
	James J. Johnston
	Alvin C. Johnson, Trustee
	V. A. Johnston Family Trust
	Jones Company
	Wm. C. McMahan Estate
	Homer R. Stasney & Sons Company
	Rogers-Gibbard Trust
	Robert Beamon
	Thomas L. Hale
	Pattie Ann Beamon Lundell
	Orville Curtis Rogers, Trustee
	Veva Jane Gibbard, Trustee
GLA 77	Robert Beamon
	Robert Beamon, Trustee
	Pattie Ann Beamon Lundell
	Thomas L. Hale, Trustee
	First National Bank of Ft. Worth, Trustee for Eula May Johnston
	Rogers-Gibbard Trust
	James J. Johnston
	Alvin C. Johnson, Trustee
	V. A. Johnston
	A. V. Jones Company
	W. C. McMahan
	Homer R. Stasney
GLA 78	American Petrofina Company
	Tenneco Oil Company
	Conoco, Inc.
	Union Oil Company of California

El Paso's System	Party
GLA 106	Morris and Flora Mizel
GLA 122	Producing Royalties, Inc.
	Harold S. Long
	Dixie M. McLane Trust
	Mrs. Judy St. John Taylor
	John S. White
GLA 125	American Petrofina Company
	Anderson Construction Company, Inc.
	Benson-Montin-Greer Drilling Corp.
	Tom Bolack
	Oliver Benson
	Albert R. Greer
	Mary Eddy Jones
	Edna Fern Benson
	Walter Benson
	Charlene K. Greer
	Mary E. Jones and The First National Bank & Trust Company of Oklahoma City, Trustees U/W of F. Jones
	Late Oil Company
	A. C. Montin, Jr.
	William V. Montin
	Oklahoma and Northwestern Company
GLA 129	Delta Drilling Company
	Trustees of the DeGolyer Foundation
	Mrs. Nell V. DeGolyer
	3-M Oil Company
GLA 139	Producing Royalties, Inc.
	James A. and Hazel H. Borland
	R. Lewis Chandler Trust
	Mary C. Fannin

El Paso's System	Party
	Charles E. Graham, Jr. Lewis Chandler Mrs. Carrie B. Graham Newell R. Hays Dixie M. McLane Grandchildren's Trust Critchell Parsons Judy St. John Taylor
GLA 152, 160, 231	J. Glenn Turner Sue Reeder Turner Trust William G. Webb
GLA 153	Gretchen A. Gartner Helen L. Harvey
GLA 157	Mapco, Inc. Barbara Ann Bruss O. J. Lilly Barbara Irene McConnell
GLA 172	Crown Central Petroleum Corporation
GLA 195	William G. Webb J. Glenn Turner
GLA 196	J. Glenn Turner Sue Reeder Turner Trust William G. Webb Benson-Montin-Greer Drilling Corp. Barbara Ann Bruss Charles Albert Greer La Plata Gathering System, Inc. O. J. Lilly Huerfanito Gas Co., et al. Barbara Irene McConnell Mary R. Boecking and H. E. Boecking, Jr., Trustees U/T of Mary M. Strachley

El Paso's System	Party
	Jacqulyn M. Williams
GLA 197	Huerfanito Drilling Company, Inc.
GLA 198, 248	J. Glenn Turner Sue Reeder Turner Trust William G. Webb Frank A. Schultz
GLA 249	Benson-Montin-Greer Drilling Corp. Barbara Ann Bruss Charles Albert Greer La Plata Gathering System, Inc. O. J. Lilly Barbara Irene McConnell Mary R. Boecking and H. E. Boecking, Jr., Trustees U/T of Mary M. Strachley J. Glenn Turner Sue Reeder Turner Trust Jacqulyn M. Williams
GLA 348	Union Oil Company of California Jones Company W. C. McMahan H. R. Stasney & Sons Company Alvin C. Johnson, Trustee
GLA 349	Union Oil Company of California A. V. Jones Co. W. C. McMahan Homer R. Stasney Robert Beamon and Robert Beamon, Trustee

El Paso's System	Party
GLA 350, 351	Robert Beamon Robert Beamon, Trustee Thomas L. Hale, Trustee Pattie Ann Beamon Lundell

Northwest's System	Party
PLA 2	Atlantic Richfield Company
PLA 3	Getty Oil Company
PLA 4	Grace M. Brown Catherine B. McElvain, Inc. and as Executrix of Estate of T. H. McElvain, Deceased T. H. McElvain Oil and Gas Properties James E. McElvain, Executor of Estate of Carl R. McElvain J. Wm. McElvain Estate of F. B. Miller Mabelle McElvain Miller Mrs. Ruth M. Vaughn
PLA 5	Phillips Petroleum Company
PLA 6	Amoco Production Company J. Ralph Ellis, Jr. Jones Felvey, II First National Bank in Dallas for the Acct. of J. Ralph Ellis, Jr. McCulloch Oil Corporation Mountain States Natural Gas Corp. John D. Mugg, Jr. Jack B. Ryan

Northwest's System	Party
	Texas Oil & Gas Corp. U. V. Industries
PLAs 7, 9, 10, 11	Amoco Production Company
PLA 8	J. Ralph Ellis, Jr. Jones Felvey, II First National Bank in Dallas for the Acct. of J. Ralph Ellis, Jr. H. M. Meredith, Trustee, and First National Bank in Dallas for the Acct. of J. Ralph Ellis, Jr. Mountain States Natural Gas Corp. John D. Mugg, Jr. Amoco Production Company Jack B. Ryan Texas Oil & Gas Corp.
PLA 13	Mobil Oil Corporation
PLA 14	Champlin Petroleum Co.

Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries), And Affiliates Of The El Paso Natural Gas Company

Burlington Northern Inc.
- BN Financial Services Inc.
- Burlington Northern Airmotive Inc.
- Burlington Northern International Services Inc.
  - Burlington Northern Trading Company Inc.
- Burlington Northern Railroad Company
  - The Belt Railway Company of Chicago
  - BN Transport Inc.
    - BNT Terminals Inc.
  - Burlington Northern Dock Corporation
  - Burlington Northern (Manitoba) Limited
  - Burlington Northern (Oregon-Washington) Inc.
  - Burlington Northern Railroad Properties Inc.
  - Camas Prairie Railroad Company
  - Chicago Union Station Company
  - Clarkland Inc.
  - Clarkland Royalty Inc.
  - Davenport, Rock Island and North Western Railway Company
  - The Denver Union Terminal Railway Company
  - Galveston Terminal Railway Company
  - Houston Belt & Terminal Railway Company
  - Iowa Transfer Railway Company
  - Kansas City Terminal Railway Company
  - Keokuk Union Depot Company
  - The Lake Superior Terminal and Transfer Railway Company
  - Longview Switching Company
  - The Minnesota Transfer Railway Company
  - 906 Olive Corporation
  - Paducah & Illinois Railroad Company
  - Portland Terminal Railroad Company

The Pueblo Union Depot and Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Western Fruit Express Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company
Glacier Park Company
Dreyer Bros. Inc.
Glacier Park Boulder Company
Glacier Park Denver Company
Heritage Glacier Park Company
Maplewood Glacier Park Company
Tennessee Glacier Park Company
Washington Glacier Park Company
Washington BN Railroad Properties Inc.
Washington BN Timberlands Inc.
Glacier Park Liquidating Company
Meridian Land & Mineral Company
Milestone Petroleum Inc.
Butte Pipe Line Company
Northern Rockies Pipe Line Co.
Osage Milestone Petroleum Inc.
Portal Pipe Line Company
Saxony Corporation
New Mexico and Arizona Land Company
NZ Development Corporation
NZ Properties Inc.
Plum Creek Timber Company Inc.
R-H Holdings Corporation
The El Paso Company
El Can Petroleum Company
El Paso del Peru Company
El Paso Development Company
Ex-Mission Ranches Inc.

El Paso Exploration Company
  EPX Company
El Paso Natural Gas Company

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Respondents.

Petition For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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Petitioner El Paso Natural Gas Company (El Paso) prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit in Nos. 80-2404 and 77-1762 which were both entered on July 5, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 708 F.2d 1011 (1983) and is printed at Appendix (App.) 1a-19a.[1] The Court of Appeals reversed a decision of the

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[1] The Appendix (App.) references in this petition are to the appendix volume filed by California with its cert. petition in No. 83-1321, October Term, 1983, under the style, The People of the State of California and The Public Utilities Commission of the State of California v. Tenneco Oil Company. The California appendix volume contains the several opinions and judgments below. El Paso has therefore not filed its own appendix.

Federal Energy Regulatory Commission (FERC) and affirmed a decision of a federal district court. The ALJ's Initial Decision on Jurisdictional Status of Lease Sale Agreements, *El Paso Natural Gas Company*, Docket No. CP74-314, *et al.*, is reported at 12 F.E.R.C. ¶ 63,037 (1979), and is printed at App. 33a-120a. This comprehensive opinion was specifically adopted by the FERC, and hence is part of the FERC opinion. App. 31a. The FERC's Order Affirming Initial Decision and Initiating Further Hearing, *El Paso Natural Gas Company*, Docket No. CP74-314, *et al.*, is reported at 12 F.E.R.C. ¶ 61,296 (1980) and is printed at App. 21a-31a. The FERC's Order Denying Applications for Rehearing is reported at 13 F.E.R.C. ¶ 61,239 (1980) and is printed at App. 153a-54a. The decision of the district court, *El Paso Natural Gas Co.* v. *Sun Oil Co.*, is reported at 426 F. Supp. 963 (W.D. Tex. 1977) and is printed at App. 121a-36a. The Court of Appeals concluded in 1978 that it should not decide the appeal from the district court until it had the benefit of the FERC decision. This opinion and an order clarifying it are printed at App. 137a-44a. The opinion, *Tenneco Oil Co.* v. *FERC*, is reported at 580 F.2d 722 (5th Cir. 1978).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The Court of Appeals for the Fifth Circuit concluded that the San Juan lease sale transactions involved in this proceeding were not sales for resale under § 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b). In so ruling, the Fifth Circuit in No. 80-2404 reversed an FERC determination that the transactions were sales under section 1(b) and in No. 77-1762 affirmed an earlier federal district court decision that the transactions were not sales under section 1(b). The FERC had jurisdiction pursuant

to §§ 4, 5, 8, 14 and 16 of the Natural Gas Act, 15 U.S.C. §§ 717c, d, f, g, m and o. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and § 22 of the Natural Gas Act, 15 U.S.C. § 717u. The FERC, however, was not a party to the district court proceeding; the district court declined to refer the jurisdictional issue in this case to the FERC under the doctrine of primary jurisdiction.

2. The Court of Appeals entered judgments in No. 80-2404 (reversing the FERC) and in No. 77-1761 (affirming the district court) on July 5, 1983. App. 145a, 149a. The Court of Appeals denied rehearing on December 2, 1983. App. 151a-52a.

3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTORY PROVISION INVOLVED

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides:

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transporation or sale, but shall not apply to any other transportation or sale of natural gas or the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT OF THE CASE

1. Development Of Producer Regulation

Section 1(b) of the Natural Gas Act (NGA) states that the provisions of the Act apply to the sale in interstate commerce of natural gas for resale. The Federal Power

Commission (FPC) did not initially undertake to regulate the sale of natural gas in the field by a producer to a pipeline. However, in 1947 this Court signaled, in a manner that alarmed producers (App. 48a), that their field sales might be regulated under section 1(b). *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690 n.18 (1947). In the next years producers, including the Delhi Oil Corp. (Delhi), resisted regulation of their sales by the FPC. App. 48a. In 1954, this Court, in its landmark *Phillips* case, held that the producer sale was a regulated sale under section 1(b). *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

More than a decade later, in the *Rayne Field* case, this Court learned that the economic equivalent of a producer sale could be effected through a lease sale, wherein the producer transfers the reserves in the ground ("gas in place") to the pipeline, the pipeline completes development drilling and operates the wells, and the producer receives substantially the same net income that it would have earned if allowed to make an unregulated sale. Since the sale of gas in place is still a sale for resale, this Court held that such a sale was a regulated sale under section 1(b). *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965).

2. San Juan Producers' Attempted Circumvention Of Regulation

The lease sale alternative was first devised during the period of regulatory uncertainty that followed this Court's *Interstate* decision. In early 1948, Delhi, led by oilman Clint W. Murchison, agreed to sell gas under a conventional producer-pipeline sales contract to El Paso from reserves controlled by Delhi at Barker Dome in northwestern New Mexico, near the San Juan Basin. Delhi's performance under this contract (as well as a 1949

replacement contract) was conditioned on its obtaining a ruling from the FPC that deliveries under the contract would not make it a regulated seller. App. 45a-46a. When in the end the FPC could not assure Delhi that its proposed sale to El Paso would not come under regulation, Delhi and El Paso restructured the sale from a conventional sale to a lease sale that put the parties "in about the same economic positions they would have enjoyed under a conventional wellhead gas sale contract." App. 50a. Delhi's counsel advised that the lease sale would not be a section 1(b) sale. App. 49a-50a. As the FERC found, "[t]he Barker Dome dealings . . . probably represented a more blatant attempt to evade Federal regulation than the scheme which occurred in the *Rayne Field* case." App. 105a.

Following the Barker Dome transaction, Delhi and other producers in the San Juan Basin acquired control over huge proven reserves in the San Juan Basin of New Mexico/Colorado, which was (and still is) one of the two largest dry gas fields in the United States. App. 56a-57a. Delhi's reserves were ready for sale in 1951. App. 57a. Delhi estimated these reserves at 1.063 Tcf. R.9692. As in Barker Dome, Delhi would not sell the gas under a conventional sales contract, but rather insisted on a lease sale (now known as GLA 47) that was its economic equivalent. App. 56a-61a, 68a, 24a-25a. Again, Delhi's counsel advised that the lease sale would not be a section 1(b) sale. App. 60a. Once Delhi closed its transaction with El Paso,[2]

[2] Based on the GLA 47 reserves, the FPC certificated El Paso to build expanded facilities, with an estimated capital cost of $46,187,686 (in 1952 dollars), to produce, transport, and sell an addtional 120 million cubic feet per day of gas from the San Juan Basin (43.8 Bcf annually). The FPC removed the 34 Bcf annual limitation which it had imposed in intially authorizing the San Juan line in 1950. El Paso Natural Gas Co., 11 F.P.C. 1071, 1074 (1952).

other producers transferred their reserves (gas in place) to El Paso under similar transactions. App. 61a-62a. Pacific Northwest Pipeline (PNW), which sought gas supply in the Basin beginning in 1952, obtained essentially its entire domestic supply through lease sale transactions in the Basin. App. 74a-86a.

In the San Juan Basin, due to the blanket nature of the major (Mesaverde) sandstones, a few strategically placed wells proved up large reserves over an extensive area. Producers controlling significant reserves did not drill development wells before they contracted with pipelines operating in the Basin.[3] This was true whether the producer dedicated his reserves to the pipeline under a conventional sale[4] or under the lease sale alternative. If under a conventional contract, the producer obtained a

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[3] A producer typically drills only enough wells to establish the proven nature of his acreage and to show to the satisfaction of an interested pipeline that adequate reserves are present. He defers development drilling until he concludes a long-term sales contract that induces him to develop through satisfactory provisions concerning the volume to be purchased and the price to be paid. Indeed, "[w]ithout the . . . market security provided by long-term contracts, investment in the large capital assets associated with the *production* . . . of gas would be substantially retarded." Pierce, "Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry," 97 Harv. L. Rev. 345, 354 (1983) (italics added).

[4] For example, in early 1950 Stanolind Oil & Gas Company, the producing arm of Standard Oil of Indiana, contracted to sell Mesaverde gas to El Paso. As of the date of the contract, there were two Mesaverde wells on the 18,794 proved acres (515 Bcf) dedicated under the contract. R.9862; Mesaverde maps attached to R.9709-9722. At the then established state spacing pattern of one Mesaverde well per 320 acres (*see* App. 65a), an additional 56 wells were needed to complete development. Also in early 1950, Delhi contracted to sell Mesaverde gas to Southern Union Gas Company. Delhi then drilled the development wells. Delhi dedicated 22,512 proved acres (436 Bcf) to this intrastate sale. R.5249

satisfactory take-or-pay clause to ensure that capital spent on development wells was recovered within a reasonable period. Under the lease sale alternative, the San Juan producers imposed on the pipelines through the lease sale contracts the obligation to drill the development wells in a timely manner that ensured that the producers would receive approximately the same net income stream as under an unregulated, conventional gas sales contract with comparable pipeline take obligations. App. 59a, 68a.

Under the lease sales, the San Juan producers received payment in cents per Mcf on the entire net interest assigned to the pipeline.[5] In the case of GLA 47, the payment was on about 70%[6] of the total gas volume produced from wells on the leases dedicated to El Paso under GLA 47. This per Mcf payment, which became known as special overriding royalty, escalated at fixed intervals in early years until it reached the 10¢ level. Thereafter, the payment was to be fixed at market value at five-year

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[5] "Net interest" is the interest in production remaining after deduction of base royalty and conventional overriding royalty. The base royalty is the percentage interest retained by the landowner upon his initial assignment of the lease. The base royalty is generally one-eighth (12½%). Williams & Meyers, *Manual of Oil and Gas Terms*, at 656 (5th ed. 1981). A conventional overriding royalty is the percentage interest retained by a lessee upon his assignment of the lease to a subsequent lessee. The conventional overriding royalty is "not commonly greater than one-eighth, and one-sixteenth, one-thirty-second, and one-sixty-fourth, or even smaller fractions are usual." *Id.* at 410. Base royalty and overriding royalty owners receive their payments free and clear of all cost.

[6] Due to trading in leases, the leases were burdened with base royalty and conventional overriding royalty totalling 30% in Delhi's hands. Under the lease sale agreement, El Paso was obligated to pay these conventional royalties and, in addition, was obligated to pay Delhi the special overriding royalty on the balance (70%) of the production.

intervals by agreement or, absent agreement, by arbitration. There was also a favored nations clause which generally provided that each producer was entitled to any higher special overriding royalty paid to another producer. App. 58a.

3. Ratepayer Injury Since 1974

This controversy erupted in 1973 when one of the producers, Sun Oil Co., obtained through arbitration an award of 40¢ per Mcf, a price significantly in excess of the then regulated price (24¢) for flowing gas of similar vintage. App. 40a n.16. Other San Juan producers then sought to redetermine their price either through arbitration or favored nations treatment based on the Sun award. App. 40a-41a. In response, El Paso, later joined by Northwest Pipeline Corp. (NWP),[7] sued in federal court to enjoin the arbitrations and, in addition, requested that the court, following reference to the FPC under the doctrine of primary jurisdiction, declare that the lease sale transactions were section 1(b) sales under *Rayne Field*. App. 41a. In 1974, in order to bring about an adjudication that included all San Juan lease sale producers, including many not before the district court, El Paso and NWP initiated complaint proceedings before the FPC.

Also in 1974, in order to set the level of the payment to the producers so that El Paso could recover this cost in fixing its rates to its customers, El Paso reached settlement agreements with the producers on its system under which it commenced paying all producers a special overriding royalty of 40¢ per Mcf as of June 1, 1974, and further agreed that thereafter it would each year on June 1 redetermine the price, with the price to be redeter-

[7] NWP succeeded to the assets of PNW, which El Paso divested to NWP pursuant to order of this Court. App. 38a n.10.

mined at the highest regulated price of general applicability (regardless of vintage) less 7¢ per Mcf. *See* App. 42a n.24. As a result, the producers began to receive the highest regulated "new" gas price less 7¢, even though this gas then was almost all "old" or flowing gas. In the 1974 Settlement Agreements, El Paso specifically reserved the right to continue to litigate the section 1(b) issue.[8]

Since 1974, and especially with the advent of incentive pricing under the Natural Gas Policy Act (NGPA)[9] in 1978 (15 U.S.C. § 3301, *et. seq.*), the spread between the regulated price for flowing gas and new gas has become very pronounced. This means that the San Juan lease sale producers, who receive the new gas price (less a mere 7¢), have collected much more than they could lawfully have been paid if regulated. Based on the remedy which El Paso advocated in the FERC remedy case,[10] El Paso estimates that the producers on its system overcollected,

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[8] A jurisdictional finding means that the FERC is required to "conventionalize" the lease sales—*i.e.*, to equate the lease sales with properly regulated sales. In essence, the FERC would value the gas at applicable ceiling prices and deduct El Paso's cost of production. The producers would thus receive as a special overriding royalty payment in the future value less cost. Further, the producers would be required to refund with interest amounts received in excess of value less cost since 1974. The refunds, at least to October 1, 1983, would flow back to the consumer. *See* Public Service Commission of New York v. FPC, 543 F.2d 757 (D.C. Cir. 1974), *cert. denied sub nom.*, Sun Oil Co. v. Public Service Commission of New York, 424 U.S. 910 (1976).

[9] The NGPA provides for, among other things, congressionally established price ceilings for sales made by natural gas producers.

[10] The FERC remedy case, two years in preparation, was scheduled for trial in the fall of 1983, but was postponed by ALJ Benkin upon issuance of the decision below.

with interest, about $875,000,000 in the period June 1, 1974 through September 30, 1983.[11] Consumers, largely in California, paid this cost as it was a component in the determination of El Paso's downstream sales rates.

On October 1, 1983, El Paso undertook to price its pipeline production at applicable NGPA ceiling prices, rather than on a cost-of-service basis, in implementation of this Court's *Mid-La* decision, *Public Service Commission of New York* v. *Mid-Louisiana Gas Co.*, ___ U.S. ___, 103 S. Ct. 3024, 77 L.Ed.2d 668 (1983). As of that date, El Paso began to absorb the large loss generated by production from the San Juan lease sale properties on its system. The exorbitant special overriding royalty payments are directly responsible for El Paso's cost of production far exceeding applicable ceiling prices.[12]

The loss now being sustained by El Paso will be absorbed in the future either by El Paso or, if El Paso

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[11] El Paso's estimate is less than the FERC Staff's and California's because El Paso contended in the remedy case that the NGPA § 104 Certain Rocky Mountain Gas price and replacement contract price, rather than the § 104 flowing gas price, were the appropriate prices for old gas.

[12] As of October 1, 1983, 50% of the gas (by volume, not wells) was NGPA § 104 gas, 40% was NGPA § 103 gas, and 10% was NGPA § 108 gas. The applicable NGPA prices were 56¢ and 85¢ (§ 104), $2.82 (§ 103), and $3.77 (§ 108). However, El Paso pays the lease sale producers on their net interest gas at $3.35 (§ 102 as of June 1, 1983 less 7¢, without upward Btu correction). In addition, El Paso bears all other capital and operating costs. Thus, it is apparent that El Paso's total costs, including the special overriding royalties, greatly exceed the applicable ceiling prices that El Paso now includes in its downstream sales rates. To avoid this loss, El Paso undertook to reassign the properties as of October 1, 1983, but the Texas state court (11th Judicial District, Harris County) ruled on February 15, 1984, that El Paso had no right to reassign. One producer, Union Oil Co. of California, voluntarily accepted reassignment. Union accounts for about 14% of production from the lease sale transactions.

obtains special relief from the FERC,[13] by the consumer. The present value of this loss is hard to quantify, but it certainly exceeds even the enormous injury sustained by the consumer in the period 1974-October 1, 1983. As of year-end 1983, El Paso estimated that (in today's economic environment) the remaining reserve under its San Juan lease sale properties was 2.2 Tcf, a reserve even today more than twice as significant as the estimated initial reserve (989 Bcf, per 21 F.P.C. at 865) in *Rayne Field*.

4. FERC's Economic Equivalency/Commercial Realities Approach And Its Rejection By Court Below

In 1977 a federal district court found that the lease sale transactions were not subject to FPC jurisdiction. App. 121a-36a. The FERC, however, reached the opposite conclusion in 1980, adopting a detailed and comprehensive opinion by ALJ Benkin. App. 21a-120a. The FERC examined the economic and commercial realities of the lease sale transactions and found that the record evidence indisputably established that the lease sales were the economic equivalent of conventional wellhead sales and that they accomplished the transfer of large amounts of natural gas to interstate pipeline companies for resale in interstate commerce. The FERC concluded that these economic and commercial realities mandated a holding of jurisdiction. App. 104a-14a.

On July 5, 1983, the court below reversed the FERC's jurisdictional determination and affirmed the decision of the district court. App. 1a-19a. The court did not dispute the FERC's conclusion that the transactions were economically equivalent to conventional producer sales. App. 12a-14a. Nor did it dispute the FERC's exhaustive

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[13] El Paso did not seek special relief from the FERC during the pendency of the state court litigation (*see* n.12, *supra*). If El Paso applies for and receives special relief under NGPA § 104(b)(2), then the burden of this loss would fall on the consumer.

findings (*e.g.*, App. 52a-55a, 106a-07a) that the reserves underlying the lease sale properties were proven for gas production when the operating rights were transferred to the pipelines. App. 15a. The court ruled, however, that the transactions were not jurisdictional because the properties lacked sufficient development wells at the time the lease sale contracts were signed. App. 15a. In so ruling, the court found that the FERC erred in basing its decision on the economic and commercial realities of the transactions. App. 12a-14a.

REASONS FOR GRANTING THE WRITS

This case presents a question of exceptional importance concerning the scope of the Commission's jurisdiction under the Natural Gas Act to protect ratepayers from vastly excessive natural gas rates. The decision of the court below is in direct conflict with two landmark holdings of this Court. It is also in direct conflict with a landmark decision of the court below. Further, it is patently inconsistent with additional leading authorities in three circuit courts of appeals, and is also totally at odds with an important provision of the NGPA.

The decision below is wholly incompatible with the consumer protection policies of the Natural Gas Act. Unless reversed, the decision below (1) confers an enormous windfall on natural gas producers, (2) denies consumers in western states the opportunity to recover the massive overcharges paid by them since at least June 1, 1974, (3) imposes in the future enormous excess costs on El Paso and quite possibly its customers and ultimate consumers, a problem of substantial importance because even today these properties contain very large remaining reserves, and (4) creates an exception to the FERC's jurisdiction over all wholesales of natural gas that could seriously impair the future administration of the NGA

and NGPA in unpredictable ways. History teaches that producers find ways to exploit regulatory gaps to avoid price regulation in the public interest.

1. The Decision Of The Court Of Appeals Is Not Even An Arguably Correct Interpretation Of NGA Section 1(b)

A. Regulation Inescapable Under *Phillips* And The Trilogy

In *Phillips*, this Court held that the FPC had jurisdiction over independent producers because the "congressional intent [was] to give the Commission jurisdiction over the rates of *all* wholesales of natural gas in interstate commerce . . . ." 347 U.S. at 682 (italics added).

In *Rayne Field*, this Court held, contrary to the court below, that producers could not evade *Phillips* through sales of gas in place.[14] This Court observed that the lease sale was very close in economic effect to a conventional sale (381 U.S. at 396 and 401) and then advised in clear language that the Commission's jurisdiction turned on "the substance of the transaction." 381 U.S. at 404. The Court stated that the lease sale

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[14] In *Rayne Field* it was specifically brought to this Court's attention that the industry in the early 1960s had engaged in other lease sale transactions, including the Bastian Bay and Ship Shoal transactions discussed in the text. Brief for the Federal Power Commission at pp. 26-27, Federal Power Commission v. Marr, No. 693, October Term, 1964. There were at least two other reported lease sale transactions in the early 1960s: the *MCN* lease sale, in which the parties reverted to a conventional sale after an FPC examiner dismissed the pipeline's certificate application when it proposed to acquire the reserves under a lease sale agreement, Tennessee Gas Transmission Co., 27 F.P.C. 690 (1962), and the *King Ranch area* lease sale, in which the pipeline again withdrew from the proposed lease sale upon a strongly worded adverse ruling by an FPC examiner, Columbia Gas Transmission Co., 30 F.P.C. 831, 836 (1963).

> *accomplished the transfer of large amounts of natural gas to an interstate pipeline company for resale in other States.* That is the significant and determinative economic fact. To ignore it would substantially undercut *Phillips* . . . . 381 U.S. at 401 (italics added).

Contrary to the decision below, therefore, the Commission was specifically directed by this Court to focus on the economic and commercial realities of what the parties accomplished through the lease sale. The producer could not evade regulation if the lease sale was the economic equivalent of a conventional sale. Substance was to prevail over form.

To be sure, the court below purported to follow *Rayne Field*, pointing out that the lease sale properties here, unlike those in *Rayne Field*, were not substantially developed at the time the agreements were signed. But, as noted above, the essential teaching of *Rayne Field* is that in-place sales of gas are subject to the Commission's jurisdiction. The basis of this teaching was *not* the existence of substantial development, but rather was the holding in *Phillips* that *all* wholesales of natural gas are within the jurisdiction of the Commission.

Further, it makes no sense to require that the lease sale acreage be substantially drilled. A producer dedicating proven reserves to an interstate pipeline under either a conventional sale or a lease sale does not typically drill the development wells until after entering into a satisfactory contract with the pipeline.[15] In addition, the producer selling gas under a lease sale form specifies in the contract not only that the drilling be performed but also specifies the time limit within which it is to be performed, so that

[15] *See* discussion at p. 6, *supra*, including nn. 3 and 4.

he ensures himself a large income stream generated by imminent production. Consequently, as long as the properties are known to contain proven gas reserves, then it is obvious that the lease sale is in actuality a sale of gas and is thus subject to the FERC's jurisdiction.

In *Ship Shoal* (*Continental Oil Co.* v. *FPC*, 370 F.2d 57 (5th Cir. 1966), *cert. denied* 388 U.S. 910 (1967)), the producers, in the context of a new and undeveloped field,[16] asserted that the *Rayne* principle applied only to substantially developed fields—that is, fields where most development wells were drilled prior to the lease sale transfer. The Fifth Circuit squarely rejected the producers' position, noting that the Ship Shoal reserves were sufficient to induce an interstate pipeline to purchase the gas through a lease sale. 370 F.2d at 65. According to that court at that time,

> *The crucial fact here, as in Rayne, is that the assignment of the leases accomplished the transfer of large amounts of substantially proven off-shore natural gas reserves to an interstate pipeline company for eventual resale in interstate commerce.* . . . If such sales were not subject to Commission regulation, an "attractive gap" in the regulatory system would be

[16] At Ship Shoal, there was but a single completed gas well which was shut-in and had no production history. 370 F.2d at 59-60. Further, this one well was completed in just two reservoirs, with 34 to 40 additional completions needed to penetrate each of the many reservoirs then known to contain gas at Ship Shoal. 370 F.2d at 65-66. The court in *Ship Shoal* specifically acknowledged that Ship Shoal was "a 'long way' from being fully developed." 370 F.2d at 66. In this regard, the producers' petition for *certiorari* in *Ship Shoal* is instructive. There, they presented in bold type as their first heading under reasons for granting the writ, "Holding Below Nullifies Rayne Limitations." The producers specifically advised in their petition that the absence of substantial development at Ship Shoal was given no weight by the court of appeals. Petition for cert. at p. 7, Continental Oil Co. v. FPC, No. 1323, October Term, 1966.

created, and the producing states would be unable to close it. 370 F.2d at 67 (italics added).[17]

Rayne Field, Bastian Bay[18] (a summary reversal of the 10th Circuit by this Court), and *Ship Shoal* became known in the industry as "the trilogy." Together, they stood for the proposition that the transfer of substantially proven gas reserves by a producer to an interstate pipeline is a section 1(b) sale because such a transfer is the economic equivalent of a conventional sale. The presence or absence of substantial development drilling (that is, development as opposed to exploratory wells) is simply irrelevant to the jurisdictional inquiry.

Thus, the Commission, in holding that section 1(b) applied to the San Juan lease sales, merely applied settled law as expressed in the trilogy. These lease sales indisputably accomplished the transfer of large amounts of proven reserves to two interstate pipelines. As such, the lease sale transactions were the economic equivalent of a conventional sale, and hence subject to the FERC's jurisdiction.

B. Trading In Leases Not Impacted

The court below believed that a jurisdictional decision here might, contrary to the *Mobil* decision,[19] lead to the assertion of jurisdiction over the lessee "in a traditional transfer of a lease to gas-bearing lands" to a pipeline. App. 14a. The court, unlike the expert agency, failed to

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[17] The court below did not discuss the facts relating to the absence of development at Ship Shoal. GLA 47 (and the other San Juan lease sale transactions) and Ship Shoal are not distinguishable in any manner that could possibly be of regulatory consequence.

[18] FPC v. Pan American Petroleum Corp., 381 U.S. 762 (1965).

[19] Mobil Oil Corp. v. FPC, 463 F.2d 256 (D.C. Cir. 1971), *cert. denied* 406 U.S. 976 (1972).

appreciate the vast difference between an ordinary lease assignment and lease sale transactions of the type involved in the trilogy and here. *See* App. 25a-26a, 108a.

In *Mobil*, the D.C. Circuit held that an ordinary gas lease by the landowner to the producer was not the economic equivalent of a conventional producer sale, and thus was not subject to the Commission's jurisdiction. 463 F.2d at 262. It found that such leases, unlike the transaction in *Rayne Field*, involved the transfer of *unproven* acreage and thus provided for the assignment of a mere right to explore for gas. *Ibid.* The court further distinguished *Rayne Field* with the observation that "[i]n *Rayne Field* the lease-buyers were interstate pipeline companies—clearly 'natural gas companies' under the Act—and it was known that the gas was destined for interstate commerce." *Ibid.*[20] Here, as in *Rayne Field*, the lease sale transactions effected the transfer from producer to interstate pipeline of large amounts of proven natural gas reserves for resale in interstate commerce. Thus, contrary to the decision below, *Mobil*, by clearly distinguishing the producer-pipeline lease sale, supports

[20] *Mobil* also did not involve the calculation of landowner royalty based on market values that exceeded applicable federal ceilings (463 F.2d at 264-65), as major producers emphasize at pp. 15 and 19 of their presently pending petition for cert., Mobil Oil Corp. v. Batcheldor, No. 83-1248, October Term, 1983. These producers, which include several involved here (Amoco Production Co., Atlantic Richfield Co., Mobil Oil Corp.), contend in their Petition that calculating landowner royalty on the basis of the highest federally approved price for the newest gas when the gas is old gas violates the supremacy, commerce, and due process clauses. If so, then the payments made to the producers here, which are paid on the same new gas price but also on 70% or more of production, as opposed to 14% in *Batcheldor*, should also be based on applicable Commission ceilings. The contention made by the producers in *Batcheldor* is also made by Tenneco Oil Co., successor to Delhi, in its answer filed in Jones v. Ashland Oil, Inc., C.A. No. 83-1769 (D. Kan.).

rather than undermines the FERC's jurisdictional determination.

It is easy to illustrate the difference between a traditional lease assignment and the transactions involved in the trilogy and here. In the traditional lease assignment, the base lessor reserves a royalty on future production. This base royalty was 12½% in the San Juan Basin. The initial lessee may either *explore* and develop or, as sometimes happens, may assign the lease, reserving a conventional overriding royalty (*e.g.*, 5%).[21] In this latter instance, the assignee, in accepting a lease burdened with more than just base royalty, believes that under existing prices he still has incentive to explore and develop in that he anticipates that proceeds from the sale of the unburdened production (in our example, 82½%)[22] will yield him a profit, taking into account his capital and operating cost. A producer assembling leases in a field acquires such leases by agreeing to pay conventional overriding royalty and further agreeing to fulfill the obligations in the base lease and any additional obligations in the assignment to him.

Jurisdictional lease sales, such as those involved in each of the trilogy and here, are markedly different from the traditional trading in leases just described. Now, the producer, with large *proven reserves*, seeks through a lease sale transaction the profit or net income that he would earn in an unregulated conventional sale. *See* App. 25a. To achieve this objective, he assigns the operating rights to the pipeline and in the assignment reserves a payment, payable on the entire balance of the production

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[21] *See* n.5, *supra*.

[22] *See* n.6, *supra*. As there explained, due to trading in leases, the lease burden totalled 30% in Delhi's hands, leaving unburdened production in Delhi's hands of 70%.

(in our example, 82½%), structured to yield him an immediate and large cash stream that equals his net income from an unregulated conventional sale.[23] He ensures that his cash stream will be immediate and large through the extensive development program imposed on the pipeline in the lease sale agreement.[24] This program is much more onerous than the development obligation found in an ordinary lease.[25] The pipeline enters the transaction in the knowledge that discharge of the rapid development obligation imposed on it will result in the immediate availability of large volumes of gas to supply a significant market need.

We emphasize that this case does *not* involve the assertion of Commission jurisdiction over either the base royalty owner or the conventional overriding royalty owner. Rather, this case involves *producers* (*e.g.*, Delhi, The Atlantic Refining Co., Phillips Petroleum Co., Sun-

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[23] Payment by the pipeline on the producer's *entire net interest* is the hallmark of a jurisdictional lease sale. Such a payment was made not only here but in each of the trilogy. There is no evidence in the record that any ordinary lease transaction ever provides for payment on the producer's entire net interest. For definition of net interest, *see* n.5, *supra*.

[24] Producers with large reserves prefer the lease sale alternatives because they receive their net income without commitment of their own capital for development. They were successful in obtaining this form of transaction because their control over vast reserves gave them the market power to impose it on the pipelines. App 113a.

[25] *Compare* App. 59a (describing El Paso's obligation under GLA 47 to drill one Mesaverde well on each 320 acre drilling unit within five years) with the standard federal lease, issued under the Mineral Leasing Act of 1920, under which the lessee, if he wishes to hold the lease, must drill one producing well within the primary term (five years) of the lease, and thereafter is only required to drill wells to protect the leased property against drainage by wells not on the property. R.9887-92 (a representative federal lease issued in 1950 to The Atlantic Refining Company on 2,562 acres in the San Juan Basin).

ray Oil Corp., or their successors) who controlled large volumes of proven reserves badly needed in California and other western states, and therefore had the opportunity to sell the gas under a conventional sales contract but selected the lease sale alternative.

C. Production And Gathering Not Relevant

The court below also improperly relied on *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), and erroneously asserted that acceptance of FERC's economic equivalency/commercial realities approach would encroach on "apparent congressional intent not to regulate production." App. 15a. In *Panhandle*, this Court held that a transfer of undeveloped leases by an interstate pipeline to a production company for sale of gas in intrastate commerce was within the "production or gathering" exemption of section 1(b) of the Natural Gas Act. *Panhandle*, however, was decided *before Rayne Field*[26] in which this Court expressly held that the production or gathering exemption did not apply to "sales of the kind affirmatively subject to Commission jurisdiction"—*i.e.*, conventional and in-place producer sales of gas to an interstate pipeline. 381 U.S. at 402. Thus, if *Panhandle* has any continuing vitality today,[27] it is limited to the transfer of leases in *intrastate* commerce.

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[26] In fact, the industry appreciated long before *Rayne Field* that the *Phillips* decision undercut *Panhandle:*

> The vitality and coverage of this case *[Panhandle]* as authority for avoidance of price control, where gas is wholesaled in interstate commerce, as here, has been at least doubtful and is understood to have been deprecated by prudent oil company counsel since *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954). Tennessee Gas Transmission Co., 40 F.P.C. 759, 800 n.3 (1963) (Initial Decision in *Ship Shoal*).

[27] Significantly, the D.C. Circuit in *Mobil* did not mention *Panhandle* in its entire opinion. The court clearly recognized that, after

The court below in reviving *Panhandle* made the very same argument it made twenty years ago in its *Rayne Field* decision. That court's decision, which this Court reversed, was premised on its reading of *Panhandle* to the effect that "leases" related to production or gathering, which led to its holding that the Rayne Field lease sale was within section 1(b)'s exemption for production and gathering. *Marr* v. *FPC*, 336 F.2d 320, 325 (5th Cir. 1964). This Court in *Rayne Field* was therefore directly confronted with the same argument by the same court that regulation of the lease sale interfered with the congressional intent not to regulate production.

In response, this Court in *Rayne Field* broadly upheld the FPC's jurisdiction under section 1(b) in recognition that federal regulation was a necessity to avoid a gap in the federal regulatory scheme and in further recognition that the states have no incentive to regulate the price achieved by a producer through a lease sale, especially where the gas is moved in interstate commerce. It harmonized the FPC's jurisdiction over the lease sale with the exemption for production and gathering by stating that the latter related to "the physical process of production or gathering in furtherance of conservation or other legitimate state concerns." *Rayne Field*, 381 U.S. at 403. This Court was entirely correct that state agencies (here, the New Mexico Oil *Conservation* Division of the Energy and Minerals Department and the Colorado Oil and Gas *Conservation* Commission (italics added)) set the rules governing the physical process of production to be followed by operators but do not purport to regulate the sale

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Rayne Field, what remained of *Panhandle* was, as Mr. Justice Douglas said in Rayne Field, but a "shadow of an ancient landmark." 381 U.S. at 406 (Douglas, J., dissenting).

(whether conventional or lease sale equivalent) by producer to pipeline.

In *Rayne Field*, this Court specifically observed that in an in-place sale gas is sold in the ground, before production and gathering takes place, but that an in-place sale is still a section 1(b) sale. 381 U.S. at 402. The Court could not have been more clear that production and gathering is an irrelevant consideration in assessing whether a producer has in economic effect achieved a conventional sale through a lease sale alternative.

2. The Decision Below Is Patently Inconsistent With Additional Leading Authorities In Three Circuit Courts Of Appeals As Well As With The NGPA

The decision below is not only erroneous under *Phillips* and the trilogy, but is also inconsistent with a host of other authoritative pronouncements.

a. The determination below that a transfer of proven but undeveloped reserves to an interstate pipeline is not jurisdictional is contrary to *Cities Service Gas Co.* v. *FPC*, 424 F.2d 411 (10th Cir. 1969). That case involved an FPC order requiring that certain pipeline-produced gas which had been transferred in-place be priced on a cost of service basis. The Tenth Circuit, in rejecting an argument based on *Panhandle*, expressly recognized that *Rayne Field* gave the FPC jurisdiction over the sale of proven reserves to an interstate pipeline. It stated: "[T]he continuing validity of Panhandle is clouded by the Rayne Field case . . . which held that FPC had jurisdiction over the sale of proven reserves to a pipeline." 424 F.2d at 416.

Moreover, the determination below is totally at odds with section 22 of the NGPA, 15 U.S.C. 3301(22). There, Congress provided, in keeping with the then universal

understanding of the trilogy, that a "*sale of proven reserves* in place to any interstate pipeline" (italics added) is a sale subject to applicable NGPA ceiling prices.

b. The rejection by the court below of the FERC's economic equivalency/commercial realities approach is wholly inconsistent with that court's decision in *Louisiana Land and Exploration Co.* v. *FERC*, 574 F.2d 204 (5th Cir. 1978), *cert. denied* 439 U.S. 1127 (1979). In *LL&E*, the Fifth Circuit affirmed the FPC's determination that the landowner who exercised control over the *Bastian Bay* lease sale was subject to its jurisdiction. The court stated: "*[E]conomic realities . . . determine whether a jurisdictional sale has occurred.*" 574 F.2d at 207 (italics added). Thus, it is not possible to reconcile either the approach in *LL&E*, which focused on the economic and commercial realities, or the result, which upheld jurisdiction over the upstream royalty owner, with the decision below which despite the realities leaves the producer unregulated.

Further, the rejection by the court below of the FERC's economic equivalency/commercial realities approach ignores the teaching of the D.C. Circuit's *Mobil* opinion. As previously noted, the court in that case, while holding that the FPC lacked jurisdiction over ordinary lease assignments, nonetheless took the view that economic equivalency was the touchstone of jurisdiction. In distinguishing the landowner from the producers in *Rayne Field*, the court stated: "When we come to an ordinary lease by the landowner to the producer there is neither a 'customary' sale in interstate commerce nor its *equivalent in economic effect.*" 463 F.2d at 262 (italics added).

3. This Court Should Consider Summary Reversal Of The Decision Below.

It is not often in today's world that an expert agency administering its own statute is reversed despite recognition that the agency did no more than regulate the economic equivalent of transactions clearly within its jurisdiction. The reversal here is especially unacceptable because the agency's "economic equivalency/commercial realities approach" was in direct implementation of this Court's holding in *Rayne Field* that its jurisdiction depended on the economic effect and substance of the lease sale transaction. 381 U.S. at 401 and 404.

When the FPC activated its investigation, it was aware of the non-jurisdictional decision reached by a federal court in an action to which it was not a party. The court below then in effect directed the FPC to complete its investigation. App. 141a. Under these unique circumstances, the FERC was especially careful to make thorough findings of fact and to provide a detailed statement of the reasons for its jurisdictional conclusion. The court below, however, not only gave the expert agency no room for judgment in giving concrete meaning and content to its own statute as required by this Court,[28] but failed even to address the agency's lengthy legal analysis (App. 86a-114a) that showed that its decision to assert jurisdiction over transactions designed to evade its reach was inescapable under *Phillips* and the trilogy.

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[28] *E.g.*, Gray v. Powell, 314 U.S. 402, 413 (1941); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944); California v. Lo-Vaca Gathering Co., 379 U.S. 366, 371 (1965) ("The Commission has acted responsibly in this situation and its decision must be upheld."); California v. Southland Royalty Co., 436 U.S. 519, 525 (1978) ("We think the Commission's interpretation of the abandonment provision of the Natural Gas Act is a permissible one."); NLRB v. Iron Workers, 434 U.S. 335, 350 (1978) ("The boards resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference.").

Since the issue involved in this case was definitively settled by *Phillips* and the trilogy, El Paso suggests that this Court consider summary reversal of the decision below, just as it summarily reversed the 10th Circuit's non-jurisdictional decision in *Bastian Bay*, the companion case to *Rayne Field*. This Court in summary reversal need cite only the trilogy and Judge Benkin's decision as adopted by the Commission.

Upon summary reversal, this Court would need to remand to the court below for disposition of the collateral estoppel and *res judicata* issues raised by the producers.[29] Since this litigation lingered in the court below for 21 months after oral argument, we request that this Court, if it orders summary reversal, direct that the court below promptly resolve these issues.

CONCLUSION

Again, this case does *not* involve the assertion of jurisdiction over either the base royalty owner or a conventional overriding royalty owner, but rather over downstream producers who had the opportunity to dedicate their vast proven reserves to interstate pipelines under conventional sales contracts but instead exercised their market power (App. 113a) to dedicate their reserves through lease sale transactions to evade price regulation. Such producers are clearly regulated sellers under section 1(b).

As important as redress for the past is to consumers in California and other western states, the outcome of this

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[29] The producers' *res judicata* and collateral claims are based on the FPC's decision in William G. Webb, 49 F.P.C. 17 (1973). The major producers involved in this proceeding were *not* parties in the *Webb* case. It is thus clear that their claims are wholly lacking in merit. United States v. Mendoza, No. 82-849, 51 U.S.L.W. 4019 (Jan. 10, 1984).

case has a major effect that will persist for several decades because of the enormous natural gas reserves that yet remain under the lease sale properties in the San Juan Basin. It is therefore of crucial importance that the long-term economic relationship among producers, two major pipelines, the pipelines' distribution customers and ultimate consumers be correctly settled now in accordance with the basic legal principle that all wholesales of natural gas are governed by applicable Commission price ceilings.

Finally, the legal issue presented here is highly defined, not difficult, and capable of quick resolution. This Court's decision in *Phillips* and the trilogy show that there is no merit in the holding below.

The petition for writs of certiorari should be granted.

Respectfully submitted,

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